**Camvac International, Inc. *and* Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.** Cases 2–CA–18209, 2–CA–18254, and 2–CA–18617

April 23, 1991

## SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On April 29, 1988, the National Labor Relations Board issued a Decision and Order[1] in this proceeding, finding that the Respondent violated Section 8(a)(1), (2), and (5) of the National Labor Relations Act. The violations included interrogations, a threat of plant closure, solicitation of grievances and promises to remedy them, promises and grants of benefits, inducing and encouraging employees to sign a petition disavowing union support, and domination and assistance to an employee committee. Because of the severity and pervasiveness of the unfair labor practices, the Board found that a bargaining order was appropriate under the test set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

On June 15, 1988, the Respondent filed a motion for reconsideration and to reopen the record. On June 21, 1988, the Respondent filed a supplemental motion for reconsideration. The Respondent moved the Board to reconsider its issuance of a bargaining order because of the extensive turnover among 288 NLRB 816. employees, and in its supplemental motion contended that a valid election held n February 1981 precluded the Board, under Section 9(c)(3) of the Act, from ordering the Respondent to bargain at a time when the Board could not have conducted a second representation election. On June 27, 1988, in an unpublished order, the Board denied as untimely both of the Respondent's motions.

On June 20, 1989, the United States Court of Appeals for the Sixth Circuit issued its opinion[2] remanding the case to the Board for consideration of whether Section 9(c)(3) of the Act precluded a bargaining order, and whether turnover at the Respondent's facility rendered a bargaining order inappropriate. The Board accepted the court's remand.

On March 2, 1990, the Board issued a Supplemental Decision and Order Remanding for Further Hearing,[3] in which it determined that Section 9(c)(3) did not preclude the Board from issuing a bargaining order effective within 1 year from a valid election. Regarding the issue of whether the turnover at the Respondent's facility rendered the bargaining order inappropriate, the Board, having accepted the court's remand as the law of the case, ordered that an expedited hearing be held before an administrative law judge on this issue to allow the parties an opportunity to present relevant evidence in light of the court's opinion.

On September 4, 1990, Administrative Law Judge Howard Edelman issued the attached supplemental decision. The Respondent[4] filed exceptions and a supporting brief, and the General Counsel filed a xxxxxxxxxxxreply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered its original decision, the judge's supplemental decision, and the record in light of the court's remand, which the Board accepts as the law of the case, and the parties' exceptions and briefs, and has decided to modify the Board's prior decision by deleting the bargaining order requirement.

In its original decision, the Board concluded that the Respondent's unlawful conduct struck at the heart of the employees' organizational campaign; that the Respondent's actions repeatedly suggested that it was to the employees' advantage to deal directly with the Respondent regarding improvements in benefits and working conditions; that the Respondent's unlawful grant of benefits was particularly difficult to remedy by traditional means because the Board does not require their recission; that the Respondent's threat of plant closure was likely to have a lasting inhibitive effect on the employees; and that, consequently, the possibility of erasing the effects of the unfair labor practices and of conducting a fair election by the use of traditional remedies was slight. Accordingly, the Board held that the employees' representation desires expressed through authorization cards would be better protected by issuing a bargaining order than by traditional remedies.

The Board recognized that there had been a significant passage of time since the violations occurred, but concluded that to withhold a bargaining order because of that factor would, in the circumstances of this case, reward the Respondent for its own wrongdoing. As noted above, the Respondent thereafter filed a motion for reconsideration and to reopen the record, arguing that the extensive turnover among employees dissipated the need for a bargaining order, and the Board denied the motion as untimely.

The Sixth Circuit remanded the case, finding that the Board erred by failing to consider the turnover issue, and that because of this error, the Board had improperly denied the Respondent's motion to reconsider and reopen the record. The court stated that the Board

[1] 288 NLRB 816.

[2] Remanded mem. 877 F.2d 62.

[3] 297 NLRB 853 (1990).

[4] The exceptions were filed on behalf of the Respondent by Dunmore Corporation, an admitted successor to the Respondent.

was ''directly confronted with evidence that may well, upon full consideration, not only vitiate the need for the bargaining order but also render the order positively unfair to current employees at [Camvac's] Brewster facility.''[5] Specifically, the court stated that the Board must consider whether the chilling effect of an employer's misconduct persists despite the turnover and thus continues to justify a bargaining order, and whether, given the turnover rate, a bargaining order would violate majority will at the time the order issues. The court recognized that a bargaining order would be justified where the employer is found to be motivated by a desire to gain time to dissipate majority status, or when employer violations themselves cause the turnover, or when it is likely that new employees continue to be intimidated by the employer's illegal antiunion activity. The court also noted, however, that when the passage of time and resultant turnover are entirely the products of the Board's delay, that fact must be carefully considered. The court stated that these fact-sensitive determinations must be explicitly made in a given case.

After a hearing ordered by the Board in accord with the court's remand, the judge found that of the 61 unit employees employed by the Respondent at the time of the Union's June 24, 1981 demand for recognition, only 3 remained employed in unit positions as of the time of the instant hearing, and 2 others been promoted to exempt supervisory positions. Thus, of the original 61 unit employees, 56 have left the Respondent's facility.[6] Further, of the 21 supervisors and managers employed by the Respondent at the time of the Union's 1981 recognition demand, only 2 are still employed by the Respondent, and neither of them was involved in the underlying unfair labor practices. The judge also found that the employee committee that the Respondent had dominated and supported ceased to exist in June 1983. The judge recommended, however, that the Board's original bargaining order remedy be affirmed because the employee and management turnover and the passage of time did not lessen the impact of the unfair labor practices, given their severity and extent.[7]

We disagree. Having accepted the Sixth Circuit's remand as the law of the case, we are bound by the court's rationale as it applies to this proceeding, and we cannot overlook the specifics of the court's directive. The facts before us, as found by the judge, are essentially what the Respondent had represented them to be in its motion for reconsideration and before the court. In this regard, the court stated that the Board had been confronted with evidence that could well vitiate the need for a bargaining order and could render the order unfair to current employees, and ordered the Board to consider turnover in assessing the appropriateness of a bargaining order. Although the court further stated that a bargaining order could be justified despite a high turnover and a significant passage of time under certain specified circumstances, we find that those circumstances have not been shown here. Thus, there is no evidence that the significant passage of time was caused by the Respondent's desire to dissipate the Union's majority status, or that the Respondent's violations themselves caused the turnover here. Further, based on our review of the record and the court's test, we conclude that the record does not contain specific facts indicating a likelihood that new and potential employees would continue to be intimidated by the Respondent's unlawful antiunion activity. We also note the long passage of time since the unfair labor practices occurred, which was caused primarily by the Board's delay. Guided by the parameters of the court's remand order, therefore, we conclude that the impact of the Respondent's unfair labor practices has been sufficiently mitigated that their effects can likely be erased through traditional remedies. We therefore find that under the terms of the court's remand issuance of a bargaining order is not warranted.

Accordingly, we shall delete the bargaining order from the Board's original Order.[8]

## ORDER

The National Labor Relations Board reaffirms the Board's original Order reported at 288 NLRB 816 (1988) as modified below and orders that the Respondent, Camvac International, Inc., Brewster, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(i) and (j) and 2(b) from the Board's original Order.

2. Substitute the attached notice for that provided in the Board's original Order.

[5] The Respondent in its motion had argued that it could prove 90 percent turnover at the facility since the unfair labor practices occurred.

[6] The Respondent admitted that such a high turnover is normal in its industry and in its geographic area.

[7] In so finding, the judge erroneously stated that the threat of plant closure in the underlying case was made by a ''high ranking official.'' The threat was actually made by a supervisor. 288 NLRB at 837.

[8] In view of our deletion of the bargaining order, the 8(a)(5) violations found in the Board's original Decision and Order, which were predicated on the issuance of a bargaining order, can no longer stand. We, therefore, also shall delete pars. 1(i) and (j) from the Board's original Order.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees about their union activities.

WE WILL NOT threaten employees with plant closure because they engaged in activities on behalf of the Union.

WE WILL NOT solicit grievances from our employees with the implied or expressed promise that these grievances will be remedied without a union.

WE WILL NOT promise or grant benefits or improvements, such as a new wage plan, a revised disciplinary policy, a profit-sharing plan, and a health club benefit, or announce such benefits or improvements in order to discourage employees from supporting the Union. However, nothing contained herein shall be construed as authorizing or requiring us to vary or abandon any benefits previously conferred.

WE WILL NOT induce or encourage employees to sign a petition disavowing their support for the Union.

WE WILL NOT promise and grant benefits to employees to circulate a petition disavowing support for the Union.

WE WILL NOT dominate, support, assist, or interfere with the operation and administration of Camvac Employee Works Committee or any other labor organization.

WE WILL NOT recognize or in any manner deal with the Camvac Employee Works Committee, or any reorganization or successor thereof, as the collective-bargaining representative of our production and maintenance employees at our Brewster, New York facility.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw all recognition from Camvac Employee Works Committee (CEWC), as the representative of our employees at our Brewster, New York facility for the purpose of dealing with CEWC concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work and completely disestablish CEWC as such representative; provided, however, that nothing in the Board's Order shall require us to vary or abandon any wages, hours, or other substantive benefits granted as a result of discussion with CEWC, or to prejudice the assertion by our employees of any rights they derived as a result of such discussions.

### CAMVAC INTERNATIONAL, INC.

*Gregory Davis, Esq.* and *David Leach, Esq.*, for the General Counsel.
*Rita Hernandez, Esq. (Kelley, Drye & Warren)*, for the Respondent.
*David Kramer, Esq.*, for the Charging Party.

## SUPPLEMENTAL DECISION

### STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. On June 20, 1989, the United States Court of Appeals for the Sixth Circuit issued its unpublished decision in the above case. The court remanded this case back to the Board for a reconsideration of two issues: (a) whether Section 9(c)(3) of the Act precluded a bargaining order and (b) whether the turnover at Respondent's facility rendered a bargaining order appropriate.

The proceedings in this case began in 1981 when a complaint issued against Camvac International, Inc. (Respondent). A trial took place before an administrative law judge and a decision issued on May 13, 1983. That decision concluded that Respondent, by its highest officials, had engaged in the commission of extensive and serious unfair labor practices and recommended that in view of the seriousness of the violations and their likely effect on the employees in the unit, a bargaining order should issue. On April 29, 1988, the Board issued its decision in the above case. The Board modified to some extent the administrative law judge's findings but concluded that upon learning on June 26 that there was union activity at its plant, Respondent immediately embarked on an antiunion campaign designed to discourage its employees from supporting Local 445, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union or Local 445). Within a month of receiving the Union's demand for recognition, Respondent granted or announced three new benefits: a new wages structure (under which most employees received wage increases and no employee received less pay), a revised disciplinary policy, and a profit-sharing plan. Within another month, Respondent granted a new health club benefit and conducted an attitude survey among employees. The attitude survey solicited employee grievances and, by a memorandum to employees, Respondent promised to review the survey and to try to make improvements in areas in which there had been criticism. Also, in September or early October 1981, Respondent threatened employees with plant closure. Further, on January 6, 1982, the Respondent induced and encouraged its employees to sign a petition disavowing their support for the Union. Further unfair labor practices committed by the Respondent included the interrogation of employees by Respondent's plant manager in October 1981, and the payment of advanced sick leave pay to employees in January 1982 in return for circulating an employee petition disavowing support for the Union.

Moreover, and significantly, during this entire period Respondent continually discussed matters relating to terms and

conditions of employment with the CEWC, an employee labor organization that Respondent unlawfully dominated and assisted. The CEWC continued to function until June 1983.

Based upon these violations the Board found that Respondent had violated Section 8(a)(1), (2), and (5) of the Act and in view of the seriousness of these violations a bargaining order was appropriate.

On June 13, 1988, Respondent's counsel moved for reconsideration of the Board's decision and for reopening of the record to receive evidence of the extensive turnover of over 90 percent among the production and maintenance and supervisory employees at the Brewster facility since 1981.

On June 20, 1988, Respondent filed a supplement to its motion for reconsideration arguing that the Board's *Gissel* order not only was inappropriate because of the extensive work force turnover at the Brewster facility, but also incorrect, as a matter of law, in view of Section 9(c)(3)'s 1-year election bar.

On June 27, 1988, however, the Board denied Respondent's motion for reconsideration as untimely. Thereafter, Respondent requested that the Board reconsider its finding of untimeliness, which request the Board denied for lack of jurisdiction, citing Respondent's May 25, 1988 filing of a petition for review in the United States Court of Appeals for the Sixth Circuit pursuant to Section 10(f) of the National Labor Relations Act.

The Board cross-petitioned the Sixth Circuit for enforcement of its April 29, 1988 Decision and Order. The Union did not intervene in the court proceedings and, after the parties' submission of briefs and oral argument, the Sixth Circuit, on June 20, 1989, issued its decision remanding the case to the Board for a determination of the two issues the Board had not considered, the Section 9(c)(3)'s election bar and the 90-percent work force turnover at the Brewster facility. Further, the Sixth Circuit expressly ordered the Board to expedite its decision.

By letter dated August 22, 1989, the Board accepted the court's remand and instructed the parties to submit statements of position on the remand issues.

On March 20, 1990, the Board in a supplemental decision rejected the argument that Section 9(c)(3)'s 1-year election bar precluded the imposition of a *Gissel* order in that same 1-year period and ordered that an expedited hearing be conducted before an administrative law judge on the turnover issue. That hearing was held on April 19, 1990.

The evidence submitted during the course of the April 29 trial established that at the initial 1981–1982 Board trial in this matter, there were 61 employees in the appropriate unit of production and maintenance employees at the time of the Union's June 24, 1981 demand for recognition.

Since that time, most of the production and maintenance work force has left Respondent's employment at the Brewster facility. Only 3 of the original 61 employees remain in Respondent's employ as production and maintenance workers—William Mitchell, Kerry Ryan, and Richard Wallace. BothMitchell and Ryan voluntarily left Respondent's employ in the 1980s, and both thereafter sought reemployment and were rehired by Respondent. They are still employed today. Richard Wallace has been continuously employed by Respondent at the Brewster facility since 1980. Two other employees, who were deemed production and maintenance employees in 1981, have since been promoted to exempt supervisory positions. Thus, Charles Wichtendahl became, and is now, a senior buyer/supervisor in the facility's purchasing department and George Kubicek is an exempt lab manager.

The remaining 56 of 61 individuals, comprising the relevant voting/bargaining unit, have left the Brewster facility. It is admitted by Respondent that such a high turnover is normal in the plastics and chemical industry and in the geographic area where the Brewster plant is located.

Of the 21 supervisors and managers employed by Respondent at the time of the Union's 1981 demand for recognition, only 2 remain employed today. Thus, Hank Kreuzer has been continuously employed at the Brewster facility since 1962 and continues in Respondent's employ today as a metallizing supervisor. John Dyson began working for Respondent in October 1980 as a sales supervisor and, after leaving the Company's employ in the early 1980s was rehired as director of sales and marketing in January 1989.

The remaining 19 of 21 supervisors and managers have left in the 9 years since 1981. These include Respondent's president, Michael Davies, who left in November 1986; Controller William Schneible, who left in January 1986; Plant General Manager Steven Vaughan, who left in May 1987; and Supervisor Richard Cea, who left prior to 1985.

The CEWC ceased to exist almost 7 years ago in June 1983.

Respondent contends essentially that turnover is the crucial or central issue as to whether a bargaining order should issue. Thus, in its brief to the judge, Respondent states, ''This extensive work force turnover goes to the very heart of the appropriateness of a *Gissel* bargaining order and in the circumstances of this case, mandates an election as the only proper remedy.''

The court, in remanding the case to the Board, held the Board should have looked at the turnover issue in this case. The Board has not generally considered turnover as an issue in deciding whether a bargaining order should issue in a *Gissel*[1]-type case. *Armour Industries*, 227 NLRB 1543 (1977), enf. denied 535 F.2d 239 (3d Cir. 1978). The court in its remand did not hold that if the turnover was 90 percent, as contended by Respondent, that a bargaining order should not issue. Rather, the court merely set forth that in evaluating whether a bargaining order is appropriate, the turnover issue must be considered along with those other factors considered by the Board. As the court stated:

> It may be that, on the facts of a given case, the concern expressed by Justice *Black* in the *Franks* case[2]—that an employer will exploit the delay caused by the administrative controversy to benefit by and persist in its antiunion conduct—will find record support. As *Gissel* itself warns, a bargaining order will be fully justified where the employer is found to be motivated ''by a desire to gain time to dissipate . . . [majority] status.'' *Gissel*, 395 U.S. at 583. Similarly, employer violations which themselves cause the claimed turnover may make a bargaining order necessary despite the fact that new employees are never asked to vote on their representative. *G.P.D., Inc. v. NLRB*, 430 F.2d 963, 964 (6th Cir. 1970), cert. denied 401 U.S. 974 (1971). And even where otherwise innocent turnover is numerically

[1] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[2] *Frank Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944).

> significant, the facts may demonstrate a likelihood that new and potential employees continue to be intimidated by the employer's illegal antiunion activity. *Exchange Bank v. NLRB*, 732 F.2d 60, 64 (6th Cir. 1984). [*Camvac International v. NLRB*, 877 F.2d 62 (6th Cir. 1989).]

The court in its remand specifically asked the Board to consider ''whether the chilling effect of the employer's misconduct persists despite the turnover and thus continues to justify a *Gissel* order, . . . and whether given the turnover rate or bargaining order would do violence to majority will at the time the bargaining order issues.''

The court expressly expressed its concern for ''worker democracy.'' Thus as I read the court's remand it is very much concerned that a labor organization not be foisted upon new employees who are not influenced by Respondent's prior unfair labor practices that ''worker democracy'' prevail, and turnover is merely one of the factors to be considered.

In reaching a conclusion as to the appropriateness of the bargaining order, and whether the unfair labor practices supporting it have a lingering effect, it is first necessary to consider the severity of Respondent's unlawful conduct. One must first appreciate that all of Respondent's unlawful conduct took place in a situation where Respondent foisted upon the unit employees a labor organization both dominated and assisted by Respondent. Moreover, such union was foisted upon the unit employees for 2 years following Local 445's demand for recognition. As set forth above and in the initial Board decision, Respondent's actions following Local 445's demand for recognition were immediate, extensive, and severe. Within 2 months of receiving the Union's demand for recognition, Respondent unlawfully granted or announced a new health club benefit, a profit-sharing plan, a revised disciplinary policy, and a new wage structure. Moreover, during this period Respondent's highest ranking officials apprised *each* employee individually of the details of the new disciplinary policy and the new wage structure. In addition, Respondent unlawfully conducted an attitude survey among *all employees* which solicited their opinions about working conditions, supervision, compensation, and benefits, and promised to try to make improvement in areas in which there had been criticism.

The Board has held that such an ''immediate and persistent response . . . of union activity reveals a general campaign to destroy employee support for the Union not only at the pertinent time discussed . . . but whenever union activity might be renewed in the future.'' *Fimco, Inc*., 282 NLRB 653, 655–656 (1987). See also *Long-Airdox Co*., 277 NLRB 1157 (1985). As noted by the Board in the instant matter, ''wage increases in particular have been recognized as having a potential *long-lasting* effect, not only because of their significance to employees, but also because the Board's traditional remedies do not require the Respondent to withdraw the benefits from the employees.'' *Color Tech Corp*., 286 NLRB 476, 477 (1987); see also *Arkansas Lighthouse for the Blind*, 284 NLRB 1214 (1987), enf. denied on other grounds 851 F.2d 180 (8th Cir. 1988); *Red Barn System*, 224 NLRB 1586 (1976), enfd. mem. 574 F.2d 315 (6th Cir. 1976); (D & O 20).

Recently, the Sixth Circuit enforced a bargaining order in a case where the violations are substantially similar to those in this case. *Indiana Cal-Pro*, 287 NLRB 796 (1987), enfd. 863 F.2d 1292 (6th Cir. 1988). In that case, the Sixth Circuit noted that ''it is well-established that threats of plant closures, by themselves, can justify a *Gissel* order,'' 863 F.2d at 1301, quoting *Piggly Wiggly v. NLRB*, 705 F.2d 1537 (11th Cir. 1983). And when such a threat is made by a ''high ranking official,'' as in the instant matter, the Board has found that the lingering effects of such unfair labor practices are likely to be exacerbated. See *Fimco, Inc*., 282 NLRB 653 at 655. Given the Board's unique fund of knowledge and expertise, such reasonable inferences are entitled to special deference by the courts. See *Amazing Stores, Inc. v. NLRB*, 887 F.2d 328, 331 (D.C. Cir. 1989).

Thus I conclude that Respondent's unfair labor practices were most serious, sufficient to support a *Gissel* bargaining order, and the type which tend to have a lingering effect on the bargaining unit.

Now I consider the effect of turnover and the Board's delay upon the lingering effect of Respondent's unfair labor practices. As set forth above, Respondent has established extensive turnover with respect to both the unit employees and supervisory staff including high level supervisors.

In determining whether an employer's unfair labor practices continue to have ''an actual chilling effect on the possibility of a free and fair election,'' at least one circuit has recognized that if the Board finds that such misconduct is ''particularly pervasive or enduring,'' the Board need only make ''minimal findings that the effects have not been dissipated by subsequent employee turnover.'' *Amazing Stores, Inc*., supra. Similarly, in deference to the Board's expertise in these matters, the Sixth Circuit has upheld bargaining orders which simply disclose the reasons for its imposition and are supported by ''more than conclusory statements.'' See *Indiana Cal-Pro, Inc*., supra, 863 F.2d at 1302.

As set forth above, virtually every bargaining unit employee was directly subjected to Respondent's misconduct, particularly with regard to its actions involving the revocation petition, the attitude survey, and the individual management-employee conferences held to explain the new wage and disciplinary policies. Moreover, these unfair labor practices took place where the employees were already represented by a labor organization dominated and assisted Respondent and in a context in which plantwide discussion was the rule rather than the exception. Given the severity, duration, and effectiveness of the Respondent's sustained unfair labor practices, and a dominated and assisted labor organization, it would be likely that new employees would become aware of such misconduct, especially since three employees still remain in the bargaining unit. *Koons Ford of Annapolis*, 282 NLRB 506, 509 (1986), enfd. mem. 833 F.2d 310 (4th Cir. 1987). (''The continued presence of these employees creates a potential that the inhibitive effect of the unfair labor practices remain, preventing the possibility of a fair election.'')

The Board has consistently issued bargaining orders in similar cases. For example, in *Arkansas Lighthouse for the Blind*, supra, the Board set aside the results of a 1981 election and issued a bargaining order because of the ''lasting coercive impact'' of the respondent's unfair labor practices, which included: threats of plant closure; withholding and granting of wage increases; soliciting revocations of union authorization cards; coercive polling; and unlawful interroga-

tions. 284 NLRB at 1221. Citing the widespread nature of the misconduct and the participation of management from top to bottom, the Board issued the bargaining order *despite the fact that 6 years had passed since the unfair labor practices were committed and only 31 of 52 bargaining unit employees remained*. Id. at 1222. The Board stated that the passage of time was ''regrettable'' but has not a ''sufficient basis'' for denying a bargaining order, and that withholding a bargaining order under the circumstances would impermissibly ''reward the Respondent for its own wrongdoing.'' Id.

In *Koons Ford of Annapolis*, supra, the Board found that the employer's unlawful interrogations and solicitation of employees to campaign against the union, in conjunction with its unlawful threats of plant closure, layoff, and discharge, warranted the invalidation of an election and the issuance of a bargaining order. 282 NLRB at 506. Although the Board noted that nearly 4 years had passed since the commission of the unfair labor practices and only 21 of 66 unit employees were still employed by the respondent, it concluded that ''simply requiring the Respondent to refrain from unlawful conduct [would] not eradicate the lingering effects of the hallmark violations, and [would] not deter their recurrence.'' Id. at 509.

In other cases, the Board has issued bargaining orders in appropriate circumstances even where there has been ''substantial and nearly complete'' turnover over a long period of time. See *Lou de Young's Market Basket, Inc*., 181 NLRB 35 (1970), enf. 430 F.2d 912 (6th Cir. 1970); *Balsam Village Management Co*., 273 NLRB 410 (1984), enfd. 792 F.2d 29 (2d Cir. 1986) (100% turnover); *Churchill's Supermarkets*, 285 NLRB 138 (1987), enfd. 857 F.2d 1474 (6th Cir. 1988) (7-year interval between unfair labor practices and Board order).

Moreover, notwithstanding the remand, Respondent failed to introduce any evidence to prove that time has healed the lingering effects of its serious unfair labor practices. Thus, Respondent did not introduce any evidence to prove that the current unit employees were unaware of Respondent's prior unlawful conduct and its antiunion position. Respondent apparently relies on the fact its turnover is in and of itself sufficient to establish that its prior unlawful conduct does not affect its current unit employees.

I conclude that Respondent has failed to prove that the Board's delay and subsequent turnover have dispelled the lingering effects of its prior unlawful conduct.

Delay in *Gissel*-type cases is inevitable. The cases are invariably complex, often involving unit issues, authorization card issues, supervisory status, and many independent and varied unfair labor practices. Such cases usually produce extensive trial records. It is not unusual that given expeditious case handling from the filing of the charge to the Board decision, that a period of 3 to 4 years can elapse. During such period substantial turnover is inevitable. If turnover were a controlling factor in determining whether a bargaining order should issue the Board would in effect only be able to issue cease-and-desist orders and direct elections. The effect would be to reward an employer and to allow him ''to profit from his own wrongful refusal to bargain.'' Thus, an employer could delay and put off indefinitely his obligation to bargain. *Gissel*, supra, 395 U.S. at 610.

In the instant case, which was a long and complex case, Respondent admits that its facility, located in the Northeast United States, normally experienced a high rate of unit employee turnover. Undoubtedly, substantial turnover would have taken place even if this case had been processed more expeditiously, in a 3- to 4-year period. Perhaps the turnover would have been 80 percent rather than 90 percent. Admittedly, it would have been substantial. The Court in its remand recognized this principle when it stated:

> It may be that on the facts of a given case the concern expressed by Justice Black in the *Franks* case[3] that an employer will exploit the delay caused by the administrative controversy to benefit by . . . its antiunion conduct—will find record support.

I conclude that was exactly Respondent's intent in this case.

The Court in its remand expressed concern that a labor organization should not be foisted upon the employees. However, it was Respondent who has foisted a union upon the employees, and thereafter committed the serious and lingering unlawful conduct discussed above. Moreover as set forth above such dominated and assisted union continued to function for 2 years after Local 445's demand for recognition. Such conduct took place with a knowledge that substantial turnover was already in progress. In this case, especially, a bargaining order does not foist a union upon unit employees. As the Supreme Court recognized in *Gissel*, supra at 613:

> There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. For, as we pointed out long ago, . . . a bargaining order involved no ''injustice to employees.''

Considering that Respondent foisted a dominated and assisted union upon the unit employees, the serious unfair labor practices committed by Respondent following Local 445's demand for recognition, the lingering effect such unfair labor practices upon unit employees, I conclude that notwithstanding 90-percent unit turnover and a delay in the Board's decision, Respondent ought not to profit from its wrongdoing, and that the issuance of a bargaining order does no injustice to unit employees who may disavow Local 445 after a reasonable period of time, I conclude that a bargaining order in this case is an appropriate remedy.

Respondent essentially contends that in view of the 90-percent employee turnover, and the Board delay, any lingering effect its unfair labor practices might have had would have been dispelled. Respondent relies essentially on two recent Seventh Circuit Court cases: *Impact Industries v. NLRB*, 847 F.2d 379 (7th Cir. 1988), and *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156 (1990). Both cases were remanded to the Board. In *Impact*, the Board deleted the bargaining order from its original order. 293 NLRB 794 (1989).

In *Impact*, the unfair labor practices included unlawful statements by Respondent's highest officials, unlawful grants of benefits, and the discharge of 13 employees out of a unit of 135 employees. At the time of the Board's order, issued

[3] *Frank Bros. Co. v. NLRB*, 321 U.S. 702 (1944).

in 1987, the employer claimed that the 7-year delay from of the unfair labor practices to the issuance of the Board's decision coupled with an 87-percent unit turnover made a *Gissel* bargaining order unnecessary. In *Montgomery Ward*, the unfair labor practices committed by the employer included surveillance, interrogation, threats of violence and loss of work hours, discharge of union leaders, unlawful conduct by the employer's highest ranking officials, and a program of grievance solicitation and wage increases. In *Montgomery Ward* there was alleged 82.4-percent turnover and an 8-year delay between commission of the unfair labor practices and the Board decision.

In both *Impact* and *Montgomery Ward* the remand was very specific. The court stated in both cases that ''The passage of time, coupled with the change in circumstance at the plant would seemingly present a strong case in support of [the companies'] argument that a second representation election should be conducted.'' Thus the remand to the Board in both cases was a virtual order that if the turnover and delay were as contended by the employer, no bargaining order should issue. In *Impact*, the Board accepting the court's remand as the law of the case noted the specific language of the remand decision as follows:

> Having accepted the Seventh Circuit's remand as the law of the case, however, we are bound by the court's rationale as it applies to this proceeding, and we cannot overlook the specifics of the court's directive. Indeed, the terms of the court's remand are highly instructive because, as stated above, the facts before us are essentially what the Respondent had represented them to be before the court of appeals. The court required the Board to consider management and employee changes as ''particularly relevant'' in determining the propriety of a bargaining order remedy in the circumstances before us and stated that the Respondent had ''seemingly present[ed] a strong case'' in favor of a second election. Guided by these statements and the court's additional instructions that because of high management and employee turnover, the prospect of a fair second election is ''a likely event,'' we conclude that the impact of the Respondent's unfair labor practices has been mitigated to the extent that their effects can likely be erased through traditional remedies. [293 NLRB at 795.]

I find the remand in the instant case significantly broader than those in *Impact* and *Montgomery Ward*. In the instant case as discussed above the remand provided only that the Board consider turnover and delay as factors usually considered. The court then pointed out, unlike the court in *Impact* and *Montgomery Ward* that even if the changed conditions are as Respondent contends, it may be that the Board will still find a bargaining order appropriate. In this connection the court in the instant case, 877 F.2d 62 (6th Cir. 1989), stated:

> It may be that, on the facts of a given case, the concern expressed by Justice Black in the *Franks* case—that an employer will exploit the delay caused by the administrative controversy to benefit by and persist in its antiunion conduct—will find record support. As *Gissel* itself warns, a bargaining order will be fully justified where the employer is found to be motivated ''by a desire to gain time to dissipate . . . [majority] status.'' Similarly, employer violations which themselves cause the claimed turnover may make a bargaining order necessary despite the fact that new employees are never asked to vote on their representative. *And even where otherwise innocent turnover is numerically significant, the facts may demonstrate a likelihood that new and potential employees continue to be intimidated by the employer's* illegal antiunion activity. [Citations omitted, emphasis added.]

Moreover, in the instant case there is a significant difference in the seriousness of the unfair labor practices and their tendency to have a long-term dramatic effect notwithstanding the significant turnover in both unit and management personnel, from those unfair labor practices involved in *Impact* and *Montgomery Ward*. As set forth above all Respondent's unfair labor practices were committed at a time when Respondent foisted a dominated and assisted union upon the unit employees. Such union was imposed upon the employees for a period of 2 years following Local 445's demand for recognition. Common sense recognizes the dramatic and long-term effect of such unlawful action, as does the court's remand when it expresses concern over ''worker democracy,'' that a union not be foisted upon the employees.

Further, in *Montgomery Ward* there was a strong dissent by Judge Ripple who quoted from *Lustak Bros*., 664 F.2d 1074, 1082 (7th Cir. 1981), a Seventh Circuit case where Respondent raised turnover as a defense to a *Gissel* bargaining order. The judge stated that ''[e]mployee turnover should not be a controlling factor because an employer could engage in a scheme of unfair labor practices and yet escape a bargaining order by delaying and waiting for employee turnover. We cannot allow this perversion of the Act's purpose.''

Accordingly, I reject Respondent's contentions.

The Supreme Court recently decided a case, *NLRB v. Curtin Matheson Scientific, Inc*., 494 U.S. 775 (1990), which strongly reaffirmed the Court's prior holdings that the NLRB has primary responsibility for applying national labor policy and the Supreme Court has always accorded Board rules considerable deference as long as such rules, are consistent with the Act. The Court in *Curtin* upheld the Board's holding that it would not apply any presumption regarding striker replacements' union sentiments, but would determine their views on a case-by-case basis. This presumption was a change in the Board's prior positions. See *Stoner Rubber Co*., 123 NLRB 1440, 1444 (1959); *Station KKHI*, 284 NLRB 1339 (1987), where the Board had taken inconsistent positions. Such strong reaffirmance of the deference accorded to the Board's rulings suggests to me that if the Board's position on turnover came before the Supreme Court, it would give similar deference to the Board's current position. In this regard I note that the issue in *Curtin*, strike replacements, is a turnover issue. In view of the current split among the Circuits concerning the Board's position on turnover, it is likely this issue will be before the Court soon. See *Impact*, supra, and *Seattle First National Bank v. NLRB*, 892 F.2d 792 (9th Cir. 1989).

Accordingly, for all of the reasons set forth above, I conclude that a bargaining order is appropriate.

During the course of the hearing before me on April 19, 1990, counsel for Respondent stated that Dunmore Corporation now owned the Brewster facility and entered an appearance on behalf of both Camvac and Dunmore Corporation. Counsel for the General Counsel then inquired as to whether the court would allow evidence on the *Perma Vinyl Corp.* (i.e., successorship) issue (164 NLRB 968 (1967) created by the alleged sale of Camvac's Brewster facility to Dunmore Corporation. In view of Camvac's ownership prior to remanding the case to me and that the change of ownership was not part of the court's remand, I ruled that I would not consider evidence for the purpose of showing whether or not Dunmore Corporation was a successor employer. Subsequently, counsel for the General Counsel made an offer of proof that had Robert McCord, Dunmore's director of manufacturing, been permitted to testify, he would have admitted that at the time of the purchase of Camvac by Dunmore Corporation on June 1989, Dunmore had general knowledge of Camvac's unfair labor practices and that Dunmore continued the same compliment of managerial and unit employees and business operations at the Brewster facility in basically the same form.

Respondent does not dispute counsel for the General Counsel's offer of proof, or that Dunmore is a successor employer. Although the court's remand did not present this issue for the Board's consideration, I will discuss it as if it were so presented in order to eliminate the necessity for further remand.

It is well settled that the Board may require a successor employer to remedy the unfair labor practices committed by the predecessor employer where the successor acquired the business with knowledge of the unfair labor practices charges against the predecessor and has continued to operate the business without substantial change or interruption. See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973); *Perma Vinyl Corp*., supra. In imposing such liability upon new employers, the Supreme Court reasoned that:

> [T]hose employees who have been retained will understandably view their job situations as essentially unaltered. Under these circumstances, the employees may well perceive the successor's failure to remedy the predecessor employer's unfair labor practices . . . as a continuation of the predecessor's labor policies. . . . [I]f the employees . . . do not take collective action, the successor may benefit from the unfair labor practices due to a continuing deterrent effect on union activities. [414 U.S. at 184.]

At the threshold, the General Counsel need only establish that, prior to the transfer of ownership, an agent of the successor knew or reasonably should have known of facts which could lead to the finding of an unfair labor practice charge; ultimately, the burden rests with the successor employer to prove a lack of any such knowledge. See *NLRB v. South Harlan Coal*, 844 F.2d 380, 385 (6th Cir. 1988).

In the instant matter, there is overwhelming evidence that, prior to purchasing the Brewster facility, Dunmore Corporation knew or should have known about the outstanding bargaining order issued against Camvac. First, Dunmore hired the same labor law firm to represent it in these proceedings, Kelley, Drye & Warren, that had represented Camvac prior to the sale of the Brewster facility on June 29, 1989. As legal counsel and agent of Dunmore, Relley, Drye & Warren had knowledge of the unremedied unfair labor practices prior to the transfer of ownership; therefore, such knowledge is imputable to Dunmore. Second, Dunmore's ''top management personnel,'' Robert Dalton and Robert McCord, almost certainly had previous knowledge of the outstanding *Gissel* order herein as they had been employed in similar positions by Camvac since September 1985 and March 1987, respectively and, had reviewed the ''union'' file pertaining to Camvac's unfair labor practices.

It is undisputed that Dunmore has retained essentially the same work force and continued substantially the same business operations at the Brewster facility as its predecessor Camvac had. No employees were terminated and management personnel remained the same after the sale of Brewster facility in June 1989. Robert McCord, by his affidavit, stated that ''all Camvac employees, both hourly and salaried, were offered positions of employment with Dunmore at the Brewster facility, with full credit for prior service with Camvac and at wage and benefit levels at least as favorable as those provided by Camvac.'' Moreover, Dunmore's business operations at the Brewster facility had continued essentially in the same fashion as Camvac's.

Respondent argues that the sale of the Brewster facility to an innocent bona fide purchaser is yet another ''changed circumstance'' which militates against issuing a bargaining order in the case at bar. However, Respondent fails to acknowledge that the effects of the predecessor employer's unfair labor practices have not been remedied, thus depriving the employees of union representation for over 9 years. The Supreme Court found that it is well within the Board's discretion to impose remedial liability upon an innocent purchaser with notice of the underlying unfair labor practices, stating:

> ''[I]n balancing the equities involved there are other significant factors which must be taken into account. Thus, 'it is the employing industry that is sought to be regulated and brought within the corrective and remedial Provisions of the Act in the interest of industrial peace.' When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively.'' [414 U.S. at 172 fn. 2, quoting *Perma Vinyl Corp*., 164 NLRB at 969.]

Dunmore has had ample opportunity to raise a *Perma Vinyl* defense since it purchased the Camvac facility but has deliberately declined to do so.

As set forth above, I conclude pursuant to the court's remand that the *Gissel* order provided by the Board in the instant case is appropriate.